FILED
MAY 12 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941

NO. 1234

THE PEOPLES NATURAL GAS COMPANY and EDWARD M. BORGER, PRESIDENT, THE PEOPLES NATURAL GAS COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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WILLIAM STANLEY,
MAX O'RELL TRUITT,
CARL MCFARLAND,
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1 Pike & Fischer on "Administrative Law" § 44g.31. 14

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FEDERAL POWER COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, The Peoples Natural Gas Company, and Edward M. Borger, President, The Peoples Natural Gas Company, respectfully represent:

Summary Statement of the Matter Involved.

The Federal Power Commission (hereinafter usually referred to as the "Commission") on March 12, 1940, instituted an investigation (1) to determine whether The Peoples Natural Gas Company (hereinafter usually

referred to as the "Company") was subject to the jurisdiction of the Commission under the Natural Gas Act of June 21, 1938, c. 556 (52 Stat. 821; 15 USCA § 717 *et seq.*) and (2) to determine whether any rates charged by the Company subject to the Commission's jurisdiction were excessive and if so to reduce them (R. 3, 9). The Company denies that it is subject to the jurisdiction of the Commission under said Act because it is a local producing, gathering and distributing company and seeks to have the question of jurisdiction judicially decided before being subjected to a complete investigation of all of its properties, operations, investments, costs, depreciation, contracts, classifications and rates, such as the Commission proposes to make (R. 25).

The Company is incorporated under the laws of Pennsylvania to do business only in that state (R. 33). The Company is engaged in the business of producing, purchasing and distributing natural gas wholly within western Pennsylvania and supplies gas primarily to residents and industries in Pittsburgh and its environs (R. 31, 33). The entire management of the Company's business is conducted from its own office building in the City of Pittsburgh, Pennsylvania, which is its chief place of business. The Company neither owns, operates nor has any interest in any property outside of Pennsylvania (R. 33). The Company sells gas to over 150,000 consumers (R. 33).

All of the Company's rates, charges, classifications and sales are regulated by the Public Utility Commission of the Commonwealth of Pennsylvania, regardless of whether the sale be to an ultimate consumer or to another for resale to the ultimate consumer (R. 34, 42).

Since December 5, 1939, a small percentage of the Company's gas has been sold to the New York State Natural Gas Corporation, due to the sudden and unex-

pected exhaustion of the producing field in northwestern Pennsylvania and southwestern New York owned by said New York State Natural Gas Corporation (R. 35, 38). The gas sold by the Company to the New York State Natural Gas Corporation is delivered to the latter in Clarion County, Pennsylvania, approximately 100 miles from the Pennsylvania-New York state line (R. 37). Subsequent to said delivery in Clarion County, Pennsylvania, the Company has no further possession, control or dominion whatsoever over said gas (R. 38). Due to the denial of a hearing on the question of jurisdiction, hereinafter explained, other pertinent facts relating to the sale of gas to the New York State Natural Gas Corporation are not in the record, as, for example, that the gas produced in the Pennsylvania field tributary to the point of delivery alone exceeds the quantity sold to the New York State Natural Gas Corporation; that the gas so sold is delivered at the edge of the producing and gathering field; that the gas sold is sometimes interrupted in its flow to New York by being stored by the New York State Natural Gas Corporation in northern Pennsylvania; that said sale is made at the same rate as to industrial consumers; that said sale is made contingent upon the Company having gas to spare after having supplied the demands of all of its other customers; and that the Pennsylvania Public Utility Commission has expressly and specifically taken jurisdiction over the sale by the Company to the New York State Natural Gas Corporation.

On June 14, 1940, the Commission issued an order reciting that "The Peoples Natural Gas Company has made available to the representatives of the Commission certain books and records relating exclusively to the problem of the status of the said company as a natural-gas company within the purview of the Natural Gas Act" and directing that the Company under oath and

in writing show cause "Why said company should not be determined to be a natural-gas company within the purview of the Natural Gas Act." On June 28, 1940, the Company filed its sworn answer to said rule to show cause setting forth at length why it believed itself not to be a natural-gas company within the purview of said Act and why it was not amenable to the jurisdiction of the Commission in said proceeding; a copy of said answer is included in the record (R. 32). Said rule has never been disposed of and the Commission has never decided the question of jurisdiction.

Instead of deciding the question of jurisdiction, the Commission issued subpoenas *duces tecum* commanding the petitioners to produce many of the Company's records bearing solely on the question of costs, investments, revenues and rates (R. 16-19). The petitioners respectfully declined to produce said records on the ground that the Commission had no jurisdiction over them (R. 26-27). At the same time the petitioners, as always, gave the Commission complete access to all records of the Company bearing on the question of jurisdiction (R. 26). The Commission then filed a motion in the United States District Court for the District of Columbia to compel compliance with its subpoenas (R. 2). The petitioners promptly filed their answer to said motion (R. 25). The petitioners also filed a motion praying either that the Commission's motion be denied on the pleadings or that a full hearing, including the taking of the necessary evidence, be accorded the petitioners on the issue of the Commission's jurisdiction over the Company in this proceeding (R. 47). The Commission's motion was summarily granted on September 17, 1941, on the motions' calendar of the District Court, and the petitioners' motion for dismissal or assignment for trial on the question of jurisdiction was simultaneously denied (R. 49-50). The District Court refused to hear or permit the petitioners to introduce any evidence on the

question whether the Commission has jurisdiction over the Company in this proceeding—and this notwithstanding that the petitioners had their witnesses and evidence in court at the time and sought to introduce it (R. 55, 71).

The Court of Appeals for the District of Columbia affirmed the order of the District Court on February 16, 1942, and subsequently on April 13, 1942, denied a petition for rehearing (R. 78, 133).

Jurisdictional Statement.

The statutory provision believed to sustain jurisdiction is Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938. The date of the judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed is February 16, 1942.

Statute Involved.

The following provisions of the Natural Gas Act of June 21, 1938 (c. 556, 52 Stat. 821, 15 U.S.C.A. §§ 717 and 717(a)(6)(7)) are here involved:

> Section 1. * * *
>
> (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 2. When used in this Act, unless the context otherwise requires— * * *

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

Questions Presented.

1. When an administrative agency institutes an investigation and the respondent *bona fide* denies that the administrative agency has jurisdiction over it, and the administrative agency applies to a federal court for enforcement of a subpoena *duces tecum* issued by the administrative agency, is the respondent entitled to a full hearing on the question of jurisdiction and the court's adjudication thereof, before being compelled to comply with the subpoena?

2. Is a local gas company, the property and operations of which are all within a single state, and whose business essentially and predominantly is the production and gathering of natural gas and its distribution to ultimate consumers, subject to the Natural Gas Act because it sells in the producing field a small fraction of its surplus gas at the rate charged industrial consumers to another company which transports the gas, sometimes after storing it in the state of production and purchase, to another state for resale to ultimate consumers, the company first mentioned being regulated as to all of

its business, including the sale to the second company, by the state in which it operates?

Reasons Relied on for Allowance of Writ.

1. The Court of Appeals in this case has decided a question of substance relating to the construction or application of a statute of the United States which has not been, but should be, settled by this Court.

2. The Court of Appeals in this case has decided a federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court to review the judgment entered by the Court of Appeals for the District of Columbia in this case on February 16, 1942.

THE PEOPLES NATURAL GAS COMPANY,
EDWARD M. BORGER, PRESIDENT, THE PEOPLES NATURAL GAS COMPANY,

By WILLIAM WATSON SMITH,
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